(2)

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 1991

APPENDIX

KATHY HILLIARD,
Petitioner,

vs.

CITY AND COUNTY OF DENVER; DENVER POLICE DEPARTMENT,
Defendants,

and

CAPTAIN MICHAEL O'NEILL, SERGEANT ANTHONY IACOVETTA, SERGEANT MARY BETH KLEE, OFFICER SHERRY MANNING,
Respondents.

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The Court of Appeals for the
Tenth Circuit

April 24, 1991

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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v.	)	No. 89-1316
CITY AND COUNTY OF DENVER; DENVER POLICE DEPARTMENT, Defendants,	)	
and	)	
CAPTAIN MICHAEL O'NEILL; SERGEANT MARY BETH KLEE; OFFICER SHERRY MANNING, Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 89-F-857)

Jeffrey N. Herren, of Jeffrey N. Herren, P.C., Lakewood, Colorado, for Plaintiff-Appellee.

Theodore S. Halaby (Robert M. Liechty with him on the brief), of Halaby and McCrea, Denver, Colorado, for Defendants-Appellants.

Before TACHA, EBEL, Circuit Judges, and JOHNSON,* District Judge.

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*Honorable Alan B. Johnson, District Judge, United States District Court for the District of Wyoming, sitting by designation.

TACHA, Circuit Judge.

This case is an appeal by defendant police officers from the denial of their motion for summary judgment based on qualified immunity. Because we find that the existence of a constitutional right, allegedly infringed here by defendants' actions, was not clearly established at the time of the incident, we reverse.

The material facts of this case are not in dispute. Plaintiff was a passenger in an automobile driven by her male companion which was involved in a minor traffic accident. The defendants investigated the accident and arrested the plaintiff's companion for investigation of driving under the influence of alcohol. He was taken into custody by the defendants and removed from the scene.

The defendants at the same time determined that the plaintiff was too intoxicated to drive and ordered her not to do so. The car in which the plaintiff had been riding was impounded, and the plaintiff was left by the defendants in what the district court has termed a high crime area. After unsuccessfully attempting to telephone for help from a nearby convenience store, the plaintiff returned to her vehicle. There she was robbed and sexually assaulted by a third person, not a party to this appeal. She was found later the next morning, stripped naked, bleeding and barely conscious.

The plaintiff brought suit under 42 U.S.C. § 1983 (1988) and state tort law. She alleged that her constitutional rights to life, liberty, travel and personal integrity had been violated, and that, specifically, the defendants' failure to

take her into protective custody pursuant to Colorado's emergency commitment statute, Colo. Rev. Stat. § 25-1-310 (1989), had given rise to this constitutional violation.

The defendants moved to dismiss, arguing that the law controlling their actions was not clearly established, and that they therefore had qualified immunity from suit.[1] The district court dismissed all of the plaintiff's pendent state law claims and also dismissed the allegations of general constitutional deprivation under section 1983.[2] The court, however, refused to dismiss the plaintiff's claim

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[1] Because both parties had submitted affidavits in support of their positions, the district court treated the motion as one for summary judgment.

[2] The court preserved the plaintiff's claim against the City and County of Denver and the Denver Police Department pending further discovery. That claim is not involved in this appeal.

that because of the defendants' reckless disregard of the state emergency commitment statute her fourteenth amendment life and liberty interests had been invaded. At issue is whether the district court erred in finding that the defendants' actions violated clearly established statutory or constitutional rights of which a reasonable person would have known Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The district court's denial of a defendant's motion for summary judgment on qualified immunity grounds is an appealable decision within the meaning of 28 U.S.C. § 1291 (1988), Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 644 (10th Cir. 1988), and is reviewed by this court de novo. England v. Hendricks, 880 F.2d 281, 283 (10th Cir. 1989), cert.denied, 110

S.Ct. 1130 (1990).

In Harlow, the Supreme Court enunciated the standard by which claims of qualified immunity are to be evaluated. Pueblo Neighborhood Health Centers, 847 F.2d at 645. This standard provides that "[w]hen government officials are performing discretionary functions, they will not be held liable of their conduct unless their actions violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Id. (quoting Harlow, 457 U.S. at 818). In determining whether the law involved was clearly established, the court examines the law as it was at the time of the defendants' actions. Id.

It is the plaintiff's burden to convince the court that the law was clearly established. Id. (citing Lutz v. Weld County School Dist., 784 F.2d 340,

342-43 (10th Cir. 1986)). In doing so, the plaintiff cannot simply identify a clearly established right in the abstract and allege that the defendant has violated it. Id. (citing Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)). Instead, the plaintiff "must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990). While the plaintiff need not show that the specific action at issue has previously been held unlawful, the alleged unlawfulness must be "apparent" in light of preexisting law. Id. (citing Anderson, 483 U.S. at 640). The "'contours of the right must be sufficiently clear that a reasonable official would understand that

what he is doing violates that right.'" Id. (quoting Anderson, 483 U.S. at 640). If the plaintiff is unable to demonstrate that the law allegedly violated was clearly established, the plaintiff is not allowed to proceed with the suit. Id.

The rights identified by the plaintiff in her complaint are characterized as "the rights to life, liberty, travel and personal integrity secured by the Constitution and the laws of the United States. . . ." Complaint at 3, 4. As noted above, while the district court dismissed the plaintiff's general claims based solely on section 1983, it did not dismiss her claim based on the defendants' alleged violation of the state emergency commitment statute. Because the plaintiff is basing her section 1983 claim on that statute, she must show that the statute itself or the laws authorizing its

promulgation "create a cause of action for damages or provide the basis for an action brought under § 1983." Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984).

There is no contention here that the emergency commitment statute creates an implied cause of action for damages. Under Colorado law, legislative intent to provide for private recovery must be expressly set out in the statute. Board of County Comm'rs v. Moreland, 764 P.2d 812, 817 (Colo. 1988). Plaintiff therefore, under Davis, must demonstrate that this state statute creates a constitutionally protected liberty interest which will serve as the basis for her section 1983 claim.

The district court identified the plaintiff's interest as a liberty interest in personal security protected by the fourteenth amendment, citing Ingraham v.

Wright, 430 U.S. 651, 674-75 (1977), and Wood v. Ostrander, 851 F.2d 1212, 1216 (9th Cir. 1988). Memorandum Opinion and Order at 11 n.5. The defendants argue that the emergency commitment statute creates no such interest. Whether such a liberty interest exists under the facts of this case is an issue we do not reach. We hold, instead, that even if such a constitutional right exists, it was not clearly established in the law at the time of the defendants' actions thus entitling them to immunity from suit.

The Supreme Court has recognized a liberty interest in personal security in cases involving the fourth amendment right to be free from unreasonable searches and seizures, Boyd v. United States, 116 U.S. 616, 630 (1886); see also Gouled v. United States, 255 U.S. 298, 303-04 (1921), and the eighth amendment right to be free from

cruel and unusual punishment. Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982). The plaintiff here, however, does not look to these constitutional guarantees in support of her claim. Instead, she relies on Ingraham v. Wright, 430 U.S. 651 (1977), in which the Court held that junior high school students have a protected liberty interest in personal security derived from the due process clause of the fifth amendment, later incorporated into the fourteenth amendment. See Id. at 672-73. We are unpersuaded, however, that the right recognized in Ingraham clearly applies to the facts of this case.

In Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985), overruled on other grounds, 834 F.2d 380 (4th Cir. 1987), the Fourth Circuit noted that

there has been a conceptual

> struggle ever since revival of § 1983 to identify the source of a general constitutional right to bodily security comparable to that given special protection in the fourth and eighth amendments and which could be asserted under § 1983 by persons other than arrest suspects and convicts.

Id. at 1258. The court noted the absurdity of a situation where

> constitutional protections . . . exists [sic] only in those persons being taken into custody as criminal suspects and those already convicted of crime. On this view no one else in society has the protection . . . [particularly] those sufficiently virtuous or lucky not to have created any probable cause for their arrest and prosecution in the first place.

Id. The Fourth Circuit viewed Ingraham as clarifying the existence of an additional basis for the right to personal security, derived from the fifth and fourteenth amendments, which at least applies to public school students. Id. at 1259.

While Ingraham may have clarified the

law with regard to the derivation of the right recognized therein, it is less clear that Ingraham's right to personal security would apply where there is no element of state-imposed confinement or custody. Public school students, although not restricted to the same degree as arrestees, convicts and patients involuntarily committed to state mental hospitals, are similarly involved in an environment where the state has some lawful control over their liberty. Students are required by state law to attend school and thus are prevented by the state from voluntarily withdrawing from situations posing the risk of personal injury. The existence of a constitutional right to personal security as recognized in Ingraham may well depend on this element of legitimate state power over the person of the plaintiff. We note

that in a case involving the fourth amendment, the Supreme Court has observed that "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." United States v. Mendenhall, 446 U.S. 544, 554 (1980). Given the factual setting of Ingraham, we conclude it was not clearly established in 1988 that someone whose person was not under some degree of physical control by the state or who was not involved in a fourth amendment search or seizure would have a clearly established, constitutionally protected liberty interest.

We acknowledge the two circuit court

opinions identified by the plaintiff which have found a right to personal security in instances where the plaintiffs were not legally constrained by the state from moving about at will. In White v. Rochford, 592 F.2d 381 (7th Cir. 1979), the court found that children who had been left by themselves in a car beside a busy freeway when police arrested the driver had a due process right to "some degree of bodily integrity." Id. at 383 (citing Ingraham, 430 U.S. at 673). White was followed by Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988). In Wood, under facts strikingly similar to this case, the Ninth Circuit found that a passenger of an impounded vehicle, who had been sexually assaulted by a third party, could bring an action under section 1983 against the police officer who had left her in a high crime area at night after arresting her

male companion. Id. at 1216. The court found that the defendant had allegedly acted in "callous disregard for Wood's physical security, a liberty interest." Id. (citing Ingraham, 430 U.S. at 674).

The existence of these two cases, however, does not "clearly establish" that Ingraham's personal security guarantee is viable in a noncustodial setting. Indeed, given the long list of cases cited in Archie v. City of Racine, 847 F.2d 1211, 1220-21 (7th Cir. 1988), cert.denied, 109 S. Ct. 1338 (1989), and referred to by the Supreme Court in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S. Ct. 998 (1989), finding no constitutional duty on the part of state or local governments to rescue their citizens from invasion by private actors, Archie, 847 F.2d at 1220-21, the existence of two cases finding such a duty

represents the essence of a legal question whose answer is not "clearly established."

Our opinion that the state of the law in 1988 in this area was not clear is buttressed by dicta in DeShaney, decided some six months after incident involved in this case. The issue in DeShaney was whether a state or local government is required under the due process clause of the fourteenth amendment to protect its citizens from "'private violence, or other mishaps not attributable to the conduct of its employees.'" Id. at 1002 (citation omitted). Before going on to hold that there is no such fourteenth amendment requirement, the Court noted that

> [b]ecause of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process

> rights, see Archie v. City of Racine, 847 F.2d 1211, 1220-1223, and n.10 (CA 7 1988) (en banc) (collecting cases), cert. pending, No. 88-576, and the importance of the issue to the administration of state and local governments, we granted certiorari.

Id. This explicit acknowledgement by the Supreme Court regarding the state of the law governing any affirmative governmental duty to provide citizens with protection further convinces us that the law at issue here was not clearly established at the time of the defendants' actions.

The plaintiff's other allegations of violation of her constitutional rights of life, liberty and travel are too generalized to demonstrate that the defendants' alleged unlawful conduct was "apparent" in light of existing law. See Anderson, 483 U.S. at 640. The plaintiff here is simply identifying clearly established rights in the abstract and

alleging that the defendants have violated them. Such broad, nonspecific allegations are insufficient to defeat the defendants' claim to qualified immunity. See Id. at 639.

While we are appalled by the conduct of the defendants in this case, we note the danger of confusing the question of whether the plaintiff has state tort remedies with whether the plaintiff has stated a claim amounting to the deprivation of a constitutional right. The district court's opinion makes a persuasive case based on distinctions drawn from Leake v. Cain, 720 P.2d 152 (Colo. 1986), that state tort remedies may exist under these facts. We are not persuaded, however, that the plaintiff here has articulated the deprivation of a constitutional right, much less a "clearly established" constitutional right.

The judgment of the United States District Court for the District of Colorado is therefore REVERSED, and the case is REMANDED to the district court for dismissal of the charges against the defendants.

II.

Memorandum Opinion and Order of the United States District Court For the District of Colorado

September 25, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No.: 89-F-857

KATHY HILLIARD,
Plaintiff,

v.

CITY AND COUNTY OF DENVER, DENVER POLICE DEPARTMENT, CAPTAIN MICHAEL O'NEIL, SERGEANT ANTHONY IACOVETTA, OFFICER MARY BETH KLEE, AND OFFICER SHERRY MANNING,

Defendants.

MEMORANDUM OPINION AND ORDER

Sherman G. Finesilver, Chief Judge

THIS MATTER comes before the court on Defendants' motion to dismiss under Fed.R.Civ.P. 12(b)(6), or in the alternative, for summary judgment under Fed.R.Civ.P. 56. Plaintiff brings this action under 42 U.S.C. §§1983 and 1985 alleging that she was the victim of a sexual assault as a result of the failure of Defendant police officers to take her into protective custody. Defendants

O'Neil, Iacovetta, Klee and Manning are officers with the Denver Police Department, which is named as a defendant along with the City and County of Denver.

Plaintiff asserts the following claims:

1. State law claim for gross negligence against Defendant officers.
2. Section 1983 claim against Defendant officers for failure to take Plaintiff into protective custody as required by Colorado Revised Statute §25-1-310 (Emergency Commitment Statute).
3. Section 1983 claim against Defendant officers for breach of special duty to Plaintiff to ensure her safety and welfare. Plaintiff alleges that the special duty arose under state law when Defendant officers exercised control over her at the time they made the decision to investigate the accident.
4. State law claim for failure to use reasonable care in not taking Plaintiff into protective custody as required by C.R.S. §25-1-310.
5. Section 1983 claim against Defendants Police Department and City of Denver for failure to properly train police officers.

6. Section 1983 claim against Defendant officers for willful and wanton violation of Plaintiff's civil rights.
7. Section 1983 claim against Defendant officers, Defendant Police Department, and Defendant City for outrageous conduct in enforcing an official policy providing the improper and inadequate training of police officers, negligence, refusal to carry out the law, and provide protective custody.
8. Section 1985 claim against Defendant officers for conspiracy to deprive Plaintiff of her civil rights.
9. Section 1983 claim against Defendant officers for violating Plaintiff's rights to life, liberty, travel, and personal integrity by removing Plaintiff's protection, her transportation, and her male companion without providing alternative protection.
10. Section 1983 claim for attorneys fees. (sic)

Plaintiff originally filed this action in the Colorado District Court for the County of Denver. Defendants successfully removed the action to this court and filed a motion to dismiss in

lieu of an answer.[1] We exercise pendent jurisdiction over the state law claims on the grounds that they arise from the same operative facts as do the federal law claims.

Defendants move for dismissal of the state law claims against Defendant officers on the ground that the officers have statutory immunity under C.R.S. §24-10-118(2) or, in the alternative, official immunity as to their discretionary acts. Defendants also contend that the filing of the state law claims does not comply with the ninety day provisions of C.R.S. §24-

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[1] Defendants' right to removal of this type of case is not absolute. It is well settled that state courts may exercise concurrent jurisdiction over §1983 actions, particularly where state law forms a basis for the §1983 action. See e.g., Brown v. Delayo, 498 F.2d 1173 (10th Cir. 1974); Thurman v. Rose, 575 F.Supp. 1488 (D. Ind. 1983); 423 South Salina St., Inc. v. City of Syracuse, 566 F.Supp. 484, aff'd 724 F.2d 26 (D. N.Y. 1983).

10-109(6). Defendants move for dismissal of the §1983 claims against Defendant officers on the grounds that the officers have qualified immunity. Defendants assert that Plaintiff has failed to state a claim as to the conspiracy and improper training claims.

Because both parties have submitted affidavits in support of their positions we consider the motion under the requirements of Rule 56. Fed.R.Civ.P. 12(b).[2] We have considered the pleadings

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[2] This changes the burden imposed upon the parties. Under Rule 12(b)(6), we construe the complaint in the light most favorable to the plaintiff and its allegations are taken as true. See 5 C. Wright & A. Miller, Federal Practice and Procedure §1357 at 594. All facts, as distinguished from conclusory allegations, are construed in favor of the plaintiff. See Swanson v. Bixler, 750 F.2d 810, 812 (10th Cir. 1984).

A dismissal under Rule 12(b)(6) is generally not on the merits. See 5 C. Wright & A. Miller, Federal Practice and Procedure §1357 at 611. However, upon conversion of the Rule 12(b)(6) motion

and the brief of the parties in light of the applicable case law. For the reasons set forth below, Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART.

I.

Plaintiff alleges the following facts, which Defendants do not dispute in their motion for summary judgment. On or about August 12, 1988, Plaintiff was

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into a motion for summary judgment, the moving party's burden changes and he is obliged to demonstrate that there exists no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law. See 5 C. Wright & Miller, Federal Practice and Procedure §1357 at 683.

Our ruling comports with Professor Carrington's recommendation to the Advisory Committee on Civil Rules that Rule 12(b)(6) be abrogated in favor of motions for summary judgment under Rule 56 and motions for judgment on the pleadings under Rule 12(c). See Willging, Use of Rule 12(b)(6) in Two Federal District Courts (Federal Judicial Center 1989).

involved in a two car traffic accident while riding as a passenger with a male companion. The accident occurred at a late hour on Federal Boulevard in Denver near the 000 block, which is a high crime area. Shortly following the accident, a member of the other vehicle signalled a patrolling police officer for assistance.

During the investigation of the accident, Defendant police officers on the scene determined that Plaintiff's companion was intoxicated, and arrested him for driving under the influence of alcohol. Defendant officers furtner determined that Plaintiff was also intoxicated and unable to drive her companion's vehicle. The Defendants took the keys from the vehicle and left the scene with Plaintiff's companion in custody, leaving Plaintiff at the scene of the accident alone. Defendants claim that

Plaintiff was given a large sum of cash by her male companion and was left at a convenience store from where she could have called a cab. These allegations are disputed by Plaintiff.

After unsuccessfully attempting to call friends at the convenience store, Plaintiff returned to her companion's vehicle. She was immediately grabbed by an assailant, beaten unconscious, and dragged into a nearby alley way where she was sexually assaulted. Plaintiff was not found until early next morning, several hours after the assault, naked and unconscious.

Plaintiff filed her Notice of Claim with the City and County of Denver, members of the City Council, and the Manager of Safety pursuant to the Colorado Governmental Immunity Act, C.R.S. §104-1-101, et seq., on or about February 7,

1989. The state court action was filed on April 25, 1989; the case was removed to this court on May 17, 1989.

II.

Summary judgment is proper where there is no genuine issue of material fact and the moving part is entitled to judgment as a matter of law. F.R.Civ.P. 56(c); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538, (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Security Ins. Co. of Hartford v. Wilson, 800 F.2d 232 (10th Cir. 1986). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion, and all doubts resolved in favor of the existence of triable issues of

fact. World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1474 (10th Cir. 1985), cert.denied, 474 U.S. 823, 106 S.Ct. 77, 88 L.Ed.2d 63 (1985); Ross v. Hilltop Rehabilitation Hosp., 676 F.Supp. 1528 (D.Colo. 1987).

Only disputes over facts that might affect the outcome of the case will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To avoid entry of summary judgment, the non-moving party must make a sufficient showing of the essential elements of its case on which it bears the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In order to dispute the facts demonstrated by the evidence of the moving party, the non-moving party must also offer evidence, and

cannot rely on mere allegations. R-G Denver, Ltd. v. First City Holdings of Colorado, Inc., 789 F.2d 1469 (10th Cir. 1986).

On summary judgment, the movant meets its burden by informing the court of the basis for the motion, and pointing to those portions of the record it believes show a lack of material factual disputes; the movant need not show an absence of issues of material fact in order to be awarded summary judgment. Celotex, 477 U.S. at 322. The party who bears the burden of proof at trial has the burden of showing the existence of issues of material fact to be determined at trial. Id., at 322-23. The evidence presented is reviewed by the court in order to determine whether a reasonable trier of fact could find for the non-moving party, on the basis of the evidence in the motion

and the response. Matsushita Electrical Industrial Co., 475 U.S. at 587; see also, Childress, A New Era for Summary Judgments; Recent Shifts at the Supreme Court, 116 F.R.D. 183 (1987).

III.

Defendants assert that Plaintiff's first and fourth claims brought under state law must fail because Plaintiff has failed to comply with the provisions of C.R.S. §24-10-109(6). We agree. That section provides:

> No action brought pursuant to this article shall be commenced until after the claimant who has filed timely notice pursuant to subsection (1) of this section has received notice from the public entity that the public entity has denied the claim or until after ninety days has passed following the filing of the notice of claim required by this section, whichever occurs first.

Plaintiff does not respond to the effect of this statute on her state law claims,

arguing only that the statute has no effect on her §1983 claims.

The failure to substantially comply with the notice of claim provision is a complete defense to any action subject to §24-10-109. State Personnel Bd. v. Lloyd, 752 P.2d 559, 562 (Colo. 1988). The Colorado governmental immunity act is in derogation of the common law, and the legislative grants of immunity must be strictly construed. Stephen v. City & County of Denver, 659 P.2d 666 (Colo. 1983).

Plaintiff does not offer evidence that she was denied her claim by the appropriate agency, and it is clear that she did not wait the required ninety days before filing her action. Plaintiff has not complied with the jurisdictional prerequisite; her state law claims are therefore not properly before this court.

Plaintiff's state law claims are DISMISSED with leave to amend for lack of subject matter jurisdiction.

IV.

Defendants seek dismissal of the §1983 claims against the officers on the grounds that they are entitled to qualified immunity. In deciding a motion for summary judgment on qualified immunity grounds, we follow the analytical approach set forth by the Tenth Circuit in Pueblo Neighborhood Health Centers v. Lasavio, 847 F.2d 642 (10th Cir. 1988) The crux of this analysis is deciding whether reasonable officials could have believed that their conduct was lawful in light of clearly established law. Id., at 645[3].

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[3] For purposes of qualified immunity, conclusory allegations of a constitutional violation or a recitation of broad legal truisms are insufficient to a

The Supreme court has stated that in determining whether a law is clearly established,

> "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, (citation ommitted) (sic), but it is to say that in the light of preexisitng (sic) law the unlawfulness must be apparent." (citations ommitted) (sic).

Anderson v. Creighton, _____ U.S. _____, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The test for determining unreasonable conduct for purposes of qualified immunity is an objective one which does not consider the official's

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determination that the law was clearly established. Wulf v. The City of Wichita, et al., Nos. 87-1725, 87-1735, 87-1750, 87-2563, slip. op. (10th Cir. August 9, 1989).

sate (sic) of mind. Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1981). Under Harlow's objective standard, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.

Once the defense of qualified immunity has been raised, the plaintiff must come forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred. Pueblo Neighborhood Health Centers, 847 F.2d at 646. If the plaintiff has identified the clearly

established law, the defendant as the movant in a motion for summary judgment bears the normal burden of showing that no material issues of fact remain that would defeat his or her claim of qualified immunity. Id.

The trial judge is burdened with a responsibility at an early stage, to make determinations of law based upon what the clearly established law governing the case was at the time of the challenged acts. Once the issue of qualified immunity is properly injected in the case, the plaintiff is obliged to present facts which if true would constitute a violation of clearly established law. Id., citing Dominique v. Telb, 831 F.2d 673, 677 (6th Cir. 1987).[4]

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[4] We recognize that the area of qualified immunity is still in its evolutionary stages. During 1989 alone, the Tenth Circuit has issued several

V.

Plaintiff brings her second claim under §1983 on the grounds that the Defendant officers failed to follow the requirements of Colorado's emergency commitment statute, C.R.S. §25-1-310. That section provides in pertinent part:

> When any person is intoxicated or incapacitated by alcohol and clearly dangerous to the health and safety of himself or others, such person shall be taken into protective custody by law enforcement authorities or an emergency service patrol, acting with probable cause, and placed in an approved treatment facility .... A law enforcement office or emergency service patrolman, in detaining the person, is taking him into

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decisions reflecting the difficulties in applying the doctrine to specific facts. See e.g., McEvoy v. Shoemaker, No. 88-1317, (10th Cir. August 11, 1989); Wulf v. The City of Wichita, et al., Nos. 87-1725, 87-1735, 87-1750, 87-2563, slip op. (10th Cir. August 9, 1989); England v. Hendricks, 880 F.2d 281, 284 (10th Cir. 1989). See also, Comment, Anderson v. Creighton and Qualified Immunity, 50 Ohio St. L.J. 447 (Spring 1989).

> protective custody. In so doing, the detaining officer may protect himself by reasonable methods but shall make every reasonable effort to protect the detainee's health and safety .... Law enforcement or emergency service personnel who act in compliance with this section are acting in the course of their official duties and are not criminally or civilly liable therefor.

Plaintiff's third claim alleges that Defendants breached with reckless disregard a special duty created by the same statute. Because the two claims are substantively similar, we consider them together as one claim.

Defendants contend that Plaintiff's §1983 claim must fail because she has alleged no violation of federal constitutional or statutory rights in support of her §1983 claim as required by Davis v. Scherer, 468 U.S. 183, 185, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1983). Defendants improperly characterize the

holding in Davis. The Davis court stated that "[n]either federal nor state officials lose their immunity by violating the clear command of a statute or regulation - of federal or of state law - unless that statute or regulation provides the basis for the cause of action sued upon." Davis, 468 U.S. at 194, n.12.

Generally, a violation of state law is not cognizable under §1983 unless the state statute supplies a basis for the claim of a constitutional right, such as when state law creates property interests which the fourteenth amendment protects. Schepp v. Fremont County, Wyo., 685 F.Supp. 1200, 1203 (D. Wyo. 1988), citing Davis, 468 U.S. at 193. Though inartfully pleaded, Plaintiff claims that Defendants, because of their reckless disregard of state and other law, violated her fourteenth amendment life and liberty

interests without due process. As set forth below, Plaintiff's allegations are sufficient to trigger the protections of the fourteenth amendment. Plaintiff has therefore stated a cognizable claim under §1983.

Recklessness or gross negligence has been recognized by this court and several circuits to be sufficient to support a §1983 claim based on the fourteenth amendment.[5] Arko v. Broom, 518 F.Supp. 669, 672 (D. Colo. 1981). See Vinson v. Campbell County Fiscal Court, 820 F.2d 194, 199-200 (6th Cir. 1987); Taylor v. Ledbetter, 818 F.2d 791, 793 (11th Cir. 1987), cert.denied, 109 S.Ct. 1337 (1988); White v. Rochford, 592 F.2d 381, 385 (7th

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[5] Personal security has been held to be a liberty interest for purposes of the fourteenth amendment. Ingraham v. Wright, 430 U.S. 651, 674-75, 97 S.Ct. 1401, 1414, 51 L.Ed.2d 711 (1977); Wood v. Ostrander, 851 F.2d 1212, 1216 (9th Cir. 1988).

Cir. 1979).[6]

In the instant case, Plaintiff has raised genuine issues of fact tending to show that Defendants acted with gross negligence, recklessness or "deliberate indifference". Wood, 851 F.2d at 1214 (and cases cited therein). The facts put in issue by Plaintiff - that Defendants arrested the driver, impounded the vehicle, and left Plaintiff in an intoxicated state at night in a high crime area - show an intential (sic) assertion of governmental authority which could reasonably be considered to be more than a merely negligent disregard for Plaintiff's safety. Id.

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[6] The Supreme Court expressly left open the question of "whether something less than intentional conduct, such as recklessness or gross negligence, is enough to trigger the protections of the Due Process Clause." Daniels v. Williams, 474 U.S. 327, 334 n. 3.

On the facts before us, Defendants would be entitled to qualified immunity if it was not clearly established under C.R.S. §25-1-310 or other applicable law that Plaintiff should have been taken into protective custody because of the circumstances and her intoxicated state. See England v. Hendricks, 880 F.2d 281, 284 (10th Cir. 1989) ("[Defendants] would be entitled to qualified immunity if it was not clearly established under Utah law at the time of their actions that a store owner could not be charged [under Utah Code §76-10-1206]").

Defendants argue that at the time of Defendants' actions C.R.S. §25-1-310 imposed no affirmative special duty upon the officers. We disagree. Defendants rely solely upon the Colorado Supreme Court's decision in Leake v. Cain, 720 P.2d 152 (Colo. 1986) in support of their

position. In that case, the defendant was detained by police officers at a party for being unruly and intoxicated. After calming him down, the officers released the defendant into the custody of his younger brother, whom the officers determined to be sober. The defendant's brother promised to drive the defendant home.

Later in the evening, the defendant decided to drive the car to a secluded area where the party was to resume. The defendant drove the car into a group of teenagers, injuring several and killing two. The victims brought suit against the officers under §25-1-310, alleging that the officers were liable to the victims for failing to take the defendant into protective custody.

The Colorado Supreme Court held that C.R.S. §25-1-310 did not create a duty

between the police officers and the third persons who were injured by the defendant after the officers made the decision to release him to his brother. The court noted that §25-1-310 grants police officers a discretionary power which is generally immune from suit. Id., at 164. The court found that the plaintiffs were not members of the class which the statute was designed to protect, and that the statute did not contemplate a claim for relief against police officers who release an intoxicated person into the custody of a sober relative. Id., at 163. The court thus found that the plaintiffs had failed to establish a prima facie case of negligence.

The Leake case is readily distinguished from the case at bar. The instant case deals with injuries suffered by an intoxicated person, a member of the

class §25-1-310 was designed to protect. In our opinion there is a clear difference between a situation where an intoxicated person is placed into the custody of a sober relative, and a situation where an intoxicated female is left alone at night in a high crime area without transportation. This case deals not with the discretionary power of the officers, as in Leake, but with the duty that is created once the discretionary power has been exercised. Leake is not dispositive of the case at bar, and reliance upon it under the instant circumstances cannot be deemed reasonable.

We find that the clearly established state law at the time of the alleged violation was as follows. Section 25-1-310 grants an officer discretion in deciding when a person "is intoxicated or incapacitated by alcohol, and is clearly

dangerous to the health and safety of himself or others." The statute thus requires that when a person is determined to be intoxicated, a decision must be made as to whether her intoxicated state is clearly dangerous to the health and safety of herself and others. Once that determination is made in the affirmative, the statute prescribes a mandatory remedy: the intoxicated person "shall be taken into protective custody." An affirmative finding by an officer under §25-1-310 creates an unequivocal duty to the intoxicated person to carry out the remedial provisions of the statute, i.e. taking the person into protective custody.

It is clear that Defendants determined Plaintiff to be too intoxicated to drive, yet took no action under the emergency commitment statute. Defendants obviously determined that Plaintiff's

intoxicated state presented a danger to herself and others for purposes of driving an automobile. However, Defendants provide no adequate explanation as to why Plaintiff's intoxicated state presented no danger under the circumstances to herself and others for purposes of an emergency commitment statute.

At minimum, there exists an issue of material fact as to whether Defendants ever considered the clear provisions of §25-1-310 in dealing with Plaintiff that night, and if so, why their determination of intoxication did not warrant enforcement of the mandatory provisions of that statute.

Defendants cite no further case precedent in support of their position. Where, as here, there is an absence of binding precedent, we look to whatever decisional law is available to ascertain

whether the law is clearly established. Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985). Where there are few cases on point, and none is binding, "an additional factor that may be considered in ascertaining whether the law is clearly established is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result" as the non-binding authorities at that time. Wood v. Ostrander, 851 F.2d 1212, 1218 (9th Cir. 1988); Capoeman, 754 F.2d at 1515.

Plaintiff argues that the Seventh Circuit's decision in White v. Rochford, 592 F.2d 381 (7th Cir. 1979) and the Ninth Circuit's decision in Wood (supra) should control our decision in the instant case. In White, the defendant police officers arrested a driver for drag racing on the Chicago Skyway, a busy, limited access

highway. With the driver were three minor children. It was alleged that the driver pleaded with the officers to take the children to a station or phone booth so that they could contact their parents. The officers refused, and left the children in the abandoned car on the roadside in inclement weather.

The White court held that the alleged conduct stated a claim under §1983, stating that the officers "could not avoid knowing that, absent their assistance, the three children would be subject to exposure to cold weather and danger from traffic. This indifference in the fact of known dangers certainly must constitute gross negligence." White, 592 F.2d at 385. The White court thus found that a police officer may be liable under §1983 when he abandons passengers of arrested drivers thereby exposing them to

unreasonable danger.

In the Wood case, the defendant officer arrested the driver of an automobile in which the plaintiff was a passenger at 2:30 A.M. for driving while intoxicated. The officer impounded the car, and when asked by the plaintiff how she would get home, replied simply that she must get out of the car. The plaintiff was left in a high crime area with no transportation late at night. It was disputed whether the officer offered to call a friend for the plaintiff, or whether there was a nearby convenience store open for business. Relying upon the White case, the Wood court found that the plaintiff stated a cognizable §1983 claim, and that there were issues of material fact which precluded the entry of summary judgment.

Defendants argue that these two cases

are factually distinct from the case at bar, and are therefore not dispositive. We disagree. We find that the facts of this case are not distinguishable from those in White and Wood, and that a court in this jurisdiction would have adopted their rationale. Like the Wood and White case, this case involves a passenger in a vehicle who, after the arrest of the driver, was left alone without transportation in circumstances which were obviously hazardous.

The facts of this case are more extreme than in the above cases. Defendants made the determination that Plaintiff was too intoxicated to drive, and then abandoned her despite Colorado's clear statutory mandate that intoxicated persons be placed in protective custody. See C.R.S. 25-1-310. In light of the above, we find that at the time of the

alleged conduct, an officer could not have reasonably believed that leaving an intoxicated female alone at night in a high crime area comported with established law. See Pueblo Neighborhood Health Centers, 847 F.2d at 645.

Defendants argue that the White and Wood cases are overruled by the Supreme Court's ruling in Deshaney v. Winnebago County Dept. of Social Services, _____ U.S. _____, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). We disagree. In Deshaney, the mother of a child abuse victim brought suit under §1983 for violation of the victim's due process rights against the defendant county alleging that the county had prior evidence that the victim's father was abusing him yet failed to take measures to protect the child. The Supreme Court held that the county was under no duty to protect the child since

it had no part in creating the danger, and had no custody over the child. The Court specifically stated that the fact that the county had received complaints about the father did not create a special relationship between the victim and the county. Id., 109 S.Ct. at 1006.

The Supreme Court further held that when the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, it has assumed under the Constitution a corresponding duty to assume some responsibility for his safety and general well-being. Deshaney, 109 S.Ct. at 1005. The Court left open the question of whether a state may voluntarily assume the duty to protect a person when there is a special relationship. Id. at 1006. Whether Colorado had voluntarily assumed a special

relationship with the Plaintiff because of its emergency commitment statute at the time of Defendants' alleged conduct is precisely the issue before us. We find that the instant case fits precisely within the parameters of Deshaney, and Defendants' reliance thereon is misplaced.

Plaintiff has successfully argued that the law was clearly established when Defendants' actions occurred, and that there is a genuine issue of material fact as to whether Defendants violated the duty imposed by that law. Pueblo Neighborhood Health Centers, 847 F.2d at 646. From the posture of the pleadings and filings it is apparent that Plaintiff suffered injuries and sexual assault as a proximate result of Defendants' failure to take her into custody. Plaintiff's suffering a sexual assault in a high crime area late at night was a result which was easily foreseeable

to any reasonable officer.

In contrast, Defendants have come forward with no evidence in support of their motion for summary judgment as required by Pueblo Neighborhood Health Centers. The motion for summary judgment as to Plaintiff's second and third claims is therefore DENIED.

VI.

Plaintiff brings her fifth claim under §1983 against Defendant Police Department and Defendant City for failure to properly train police officers. Plaintiff asserts that the improper training resulted in Defendants' failure to take plaintiff into protective custody. Defendants argue that such a single instance of improper training is insufficient to state a claim under §1983. See City of Oklahoma City v. Tuttle, 471

U.S. 808, 105 S.Ct. 2427, 2435, 85 L.Ed.2d 791 (1985). Defendants further argue that mere negligent training does not state a claim under §1983, but that such training must amount to "deliberate indifference to the rights of persons with whom the police come into contact." See City of Canton v. Harris, _____ U.S. _____, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989).

A city may only be held liable under §1983 for the deprivation of a right if the deprivation was the result of municipal "custom or policy." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Inadequate training of police officers may represent city policy; however, that a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city. City of Canton, 109 S.Ct. at 1206.

It must also be shown that the identified deficiency in the city's training program is closely related to the ultimate injury. Id. Section 1983 liability attaches to a municipality only where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants. Id. Where the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, the policymakers of the city can be reasonably said to have been indifferent to the need. Id.

Defendants argue that the officers' leaving Plaintiff at a convenience store where she attempted to call friends or a cab does not constitute deliberate indifference. However, Defendant's version of the story is in dispute. Further, Defendants fail to address the

issue of whether their leaving an intoxicated female alone in a high crime area despite the clear provisions of a state emergency commitment statute constitutes deliberate indifference. A genuine issue of material fact is presented as to whether the several officers' failure to respond to the danger in which Plaintiff was placed constitutes a lack of training which amounts to deliberate indifference.

There exist reasonable grounds for a "failure to train" claim. Plaintiff at this point has not provided sufficient facts to support her claim. However, Plaintiff has requested additional pre-trial discovery in order to identify the deficiencies in the training program. Defendants have refused such discovery on the grounds that discovery may not continue until the qualified immunity

issue is resolved.

The information sought is uniquely within Defendants' possession. Plaintiff must be given an opportunity to establish ground for her inadequate training claim. Defendants' motion for summary judgment as to this claim is inappropriate in light of the need for full discovery on this issue, and is therefore DENIED.

VII.

We dismiss Plaintiff's sixth claim (§1983, willful and wanton violation of Plaintiff's civil rights), seventh claim (§1983, outrageous conduct), and ninth claim (§1983, violation of rights to life, liberty, travel, and personal integrity). Plaintiff's sixth and seventh claims, besides being repetitive of each other, fail because Plaintiff has established no facts in either her complaint or in her

brief in response which will support her allegations. Such a failure to support bare allegations mandates dismissal under the guidelines of Pueblo Neighborhood Health Centers.

Plaintiff's ninth claim fails on similar grounds. Plaintiff has come forward with no evidence or case law in support her claim for relief. Plaintiff's sixth, seventh and ninth claims under §1983 are therefore DISMISSED.

VIII.

Plaintiff brings her eighth claim against Defendant officers under 42 U.S.C. §1985 for conspiracy to deprive Plaintiff of her civil rights. To state a claim under this section, a complaint must allege five elements: (1) a conspiracy; (2) motivated by racial or perhaps otherwise class-based invidious

discriminatory animus; (3) for the purpose of depriving either directly, or indirectly, any person or class of persons of equal protection of the laws, or equal privileges and immunities under the laws; (4) that the conspirator committed some act in furtherance of the conspiracy; and (5) that the plaintiff was injured in his person or property or was deprived of having and exercising any right or privilege of a citizen of the United States. Sager v. City of Woodland Park, 543 F.Supp. 282 (D. Colo. 1982). Further, the plaintiff must be a member of a statutorily protected class, and the actions taken by the defendant must stem from the plaintiff's membership in the class. Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 746 (10th Cir. 1980), cert.denied, 454 U.S. 833 (1981).

City police officers are entitled to

qualified immunity from liability under this section. Crowe v. Lucas, 595 F.2d 985 (11th Cir. 1979). Thus, the burden of proof imposed by the Tenth Circuit upon the §1985 plaintiff in Pueblo Neighborhood Health Centers (supra) applies. Defendants contend that the §1985 claim must fail because Plaintiff has failed to allege a racial or class-based discriminatory animus. See Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). We agree. Although it may be cogently argued that Plaintiff was a member of a statutorily protected class, it cannot be reasonably asserted that Defendants actions were taken because of Plaintiff's membership in that class, since it is Plaintiff's contention that Defendants failed to treat her as a member of that class. Silkwood, 637 F.2d at 746. Plaintiff has failed to

state a claim under this action.

ORDER

ACCORDINGLY, Defendants motion for summary judgment is GRANTED IN PART and DENIED IN PART.

Defendants' motion for summary judgment against Plaintiff's first and fourth claims under state law is GRANTED. Plaintiff's first and fourth claims are DISMISSED without prejudice for lack of subject matter jurisdiction.

Plaintiff's second and third claims are consolidated. Defendants' motion for summary judgment against Plaintiff's second and third claims is DENIED.

Defendants' motion for summary judgment against Plaintiff's fifth claim for failure to properly train is DENIED without prejudice pending further discovery.

Defendants' motion for summary judgment against Plaintiff's sixth, seventh and ninth claims is GRANTED. Plaintiff's sixth, seventh, and ninth claims are DISMISSED for failure to state a claim.

Plaintiff has improperly filed a claim for attorney's fees under 42 U.S.C. §1983. Such a claim for attorney's fees

is DISMISSED with leave to amend.

FURTHER, Defendants' motion for protective order from discovery is DENIED. Plaintiff's Motion to Compel and for attorney's fees is DENIED. The parties are DIRECTED to proceed with full discovery as to the remaining claims.

DATED this 25 day of September, 1989 at DENVER, COLORADO.

BY THE COURT

/s/ Sherman G. Finesilver
Sherman G. Finesilver
Chief Judge
United States District Court

III.

Judgment of the United States District Court for the District of Colorado

September 26, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No.: 89-F-857

KATHY HILLIARD,
Plaintiff,

v.

CITY AND COUNTY OF DENVER, DENVER POLICE DEPARTMENT, CAPTAIN MICHAEL O'NEIL, SERGEANT ANTHONY IACOVETTA, OFFICER MARY BETH KLEE, AND OFFICER SHERRY MANNING,

Defendants.

JUDGMENT

PURSUANT TO and in accordance with the Memorandum Opinion and Order entered September 25, 1989, by the Honorable Sherman G. Finesilver, Chief Judge, it is

ORDERED that judgment is entered in favor of the defendants, above-named, and against the plaintiff, Kathy Hilliard, as to plaintiff's first, fourth, sixth, seventh, eighth and ninth claims for relief, and these claims are dismissed.

DATED at Denver, Colorado, this 26th day of September, 1989.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

BY: /s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy Clerk

IV.

Order denying Plaintiff's Petition
for Rehearing and Suggestion
for Rehearing En Banc

June 12, 1991

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KATHY HILLIARD,	)	
	)	
Plaintiff - Appellee,	)	
	)	No.
v.	)	89-
	)	1316
THE CITY AND COUNTY OF DENVER, DENVER POLICE DEPARTMENT,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
CAPTAIN MICHAEL O'NEILL, SERGEANT ANTHONY IACOVETTA, SERGEANT MARY BETH KLEE, OFFICER SHERRY MANNING,	)	
	)	
Defendants - Appellants.	)	

ORDER

Filed June 12, 1991

Before HOLLOWAY, Chief Judge, MCKAY, LOGAN SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges, and JOHNSON*, District Judge.

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*The Honorable Alan B. Johnson, District Judge, United States District Court for the District of Wyoming, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, CLERK

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

V.

Colorado Revised Statute
§ 25-1-310 (1989)

West's

COLORADO

REVISED STATUTES

Annotated

Using the Classification and Numbering System of the Colorado Revised Statutes

Title 25
Health

§21-1-301 **LEGISLATIVE DECLARATION**

(1) It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society. The general assembly hereby finds and declares that alcoholism and intoxication are matters of statewide concern.

(2) With the passage of this part 3 at its first regular session in 1973, the forty-ninth general assembly has recognized the character and pervasiveness of alcohol abuse and alcoholism and that public intoxication and alcoholism are health problems which should be handled by public health rather than criminal procedures. The general assembly further finds and declares that no other health problem has been so seriously neglected and that, while the costs of dealing with the problem are burdensome, the social and economic costs and the waste of human resources caused by alcohol abuse and alcoholism are massive, tragic, and no longer acceptable. The general assembly believes that the best interests of this state demand an across-the board locally oriented attack on the massive alcohol abuse and alcoholism problem and that this part 3 will provide a base from which to launch the attack and reduce the tragic human loss, but only if adequately funded. Therefore, in response to the needs as determined by an ad hoc committee and to assist in the implementation of this part 3 at both the local and state level, the

general assembly hereby appropriates moneys for: Receiving and screening centers and their staffs; medical detoxification; intensive treatment; halfway house care; outpatient rehabilitative therapy; orientation, education, and in-service training; division staff for the administration, monitoring, and evaluation of the program; and operating costs for patient transportation.

(Laws 1973, H.B.1279, § 1; Laws 1974, H.B.1133, § 1.)

Prior Complilations: C.R.S.1963, § 66-45-1.

§ 25-1-310. Emergency commitment

(1) When any person is intoxicated or incapacitated by alcohol and clearly dangerous to the health and safety of himself or others, such person shall be taken into protective custody by law enforcement authorities or an emergency service patrol, acting with probable cause, and placed in an approved treatment facility. If no such facilities are available, he may be detained in an emergency medical facility or jail, but only for so long as may be necessary to prevent injury to himself or others or to prevent a breach of the peace. A law enforcement officer or emergency service patrolman, in detaining the person, is taking him into protective custody. In so doing, the detaining officer may protect himself by reasonable methods but shall make every reasonable effort to protect the detainee's health and safety. A taking into protective custody under this section is not an arrest, and no entry or other record shall be made to indicate that the person has been arrested or charged with a crime. Law enforcement or emergency service personnel who act in compliance with this section are acting in the course of their official duties and are not criminally or civilly liable therefor. Nothing in this subsection (1) shall preclude an intoxicated or incapacitated person who is not dangerous to the health or safety of himself or others from being assisted to his home or like location by the law enforcement officer or emergency service patrolman.

(2) A law enforcement officer,

emergency service patrolman, physician, spouse, guardian, or relative of the person to be committed or any other responsible person may make a written application for emergency commitment under this section, directed to the administrator of the approved treatment facility. The application shall state the circumstances requiring emergency commitment, including the applicant's personal observations and the specific statements of others, if any, upon which he relies in making the application. A copy of the application shall be furnished to the person to be committed.

(3) If the approved treatment facility administrator or his authorized designee approves the application, the person shall be committed, evaluated, and treated for a period not to exceed five days. The person shall be brought to the facility by a peace officer, the emergency service patrol, or any interested person. If necessary, the court may be contacted to issue an order to the police or sheriff's department to transport the person to the facility.

(4) If the approved treatment facility administrator or his authorized designee determines that the application fails to sustain the grounds for emergency commitment as set forth in subsection (1) of this section, the commitment shall be refused and the person detained immediately released, and the person shall be encouraged to seek voluntary treatment if appropriate.

(5) When the administrator

determines that the grounds for commitment no longer exist, he shall discharge the person committed under this section. No person committed under this section may be detained in any treatment facility for more than five days; except that a person may be detained for longer than five days at the approved treatment facility if, in that period of time, a petition for involuntary commitment has been filed pursuant to section 25-1-311. A person may not be detained longer than ten days after the date of filing of the petition for involuntary commitment.

(6) Whenever a person is involuntarily detained pursuant to this section, he shall immediately be advised by the facility administrator or his authorized designee, both orally and in writing, of his right to challenge such detention by application to the courts for a writ of habeas corpus, to be represented by counsel at every stage of any proceedings relating to his commitment and recommitment, and to have counsel appointed by the court or provided by the court if he wants the assistance of counsel and is unable to obtain counsel.

(Laws 1973 H.B.1279, § 1; Laws 1976, S.B.40, § 5. Repealed and reenacted Laws 1977, S.B.514, § 5.)
Prior Compilations: C.R.S.1963, § 66-45-10.

VI.

Affidavit of Petitioner's Expert

June 13, 1989

COLORADO FORENSICS AND TOXICOLOGY, INC.
880 Interlocken Pkwy. #255
Broomfield, Colorado 80020
Phone: (303) 460-1650

AFFIDAVIT OF KATHEY M. VERDEAL, PH.D.

STATE OF COLORADO)
) ss.
COUNTY OF BOULDER)

Re: Kathy Hilliard

AFFIANT STATES:

1. That I am Laboratory Director and co-owner of Colorado Forensics and Toxicology, Inc. Said laboratory being located at 880 Interlocken Parkway, Suite 255, Broomfield, Colorado.

2. That Colorado Forensics and Toxicology, Inc. is a laboratory certified by the Colorado Department of Health to perform delayed breath analysis. That this laboratory is also certified by the Colorado Department of Health to perform alcohol analysis on blood specimens for law enforcement agencies and defendants in the State of Colorado and that these analyses have been routinely accepted as accurate at administrative hearings of the Motor Vehicle Division of the Department of Revenue and District Courts in the State of Colorado.

3. That I Hold a Doctor of Toxicology received from the University of Wisconsin-Madison in 1982. That I Have personally analyzed thousands of blood and breath alcohol samples. That I am

familiar with the current literature and have conducted experiments on the effects of alcohol on the human system and performance abilities. That I have been qualified as an expert witness in the field of Toxicology in numerous courts in the State of Colorado and other states as an expert witness in the areas of; alcohol analysis by gas chromatography, effects of alcohol upon the human body, effects of alcohol on driving, head injury in relation to alcohol and accidents, biological interactions of shock and alcohol, roadsides, nystagmus, statistics and the Intoxilyzer. I have also been qualified as an expert in the analysis of drugs in biological fluids and the effects of such drugs. That as a degreed Toxicologist, I routinely use medical records to make toxicologic interpretations. That I am qualified to make such interpretations based upon the inclusion of medical school in the curriculum for my Doctorate in Toxicology. Attached you will find a copy of my curriculum vitae.

4. That I have been asked by Jeffrey N. Herren, Attorney at Law, to calculate what blood alcohol level Ms. Hilliard would have had at the time of police contact on August 14, 1988. I have also been asked what the effects of alcohol would be at this level and whether or not the effects of this alcohol would have been visible to a trained D.U.I. officer. In order to formulate my opinions I have used following information provided by Mr. Herren:

a. Between 5:30 p.m. and 10:30 p.m. on August 14, 1988, Ms. Hilliard consumed 14 Vodka and Soda drinks.

b. At 7:00 p.m. Ms. Hilliard ate a Chinese dinner.

c. Ms. Hilliard was in contact with the police between 11:15 p.m. and 11:40 p.m. on August 14, 1988.

5. That in order to calculate a blood alcohol level for Ms. Hilliard I have made the following assumptions:

a. Ms. Hilliard had normal physiologic function.
b. Ms. Hilliard weighed approximately 115 pounds.
c. Ms. Hilliard had an average rate of elimination.
d. Each drink Ms. Hilliard consumed contained 1 ounce of 86 proof vodka.

6. That using the information and assumption given above, Ms. Hilliard would have had a blood alcohol level of approximately 0.280 to 0.380g ethyl alcohol/100ml blood between 11:15 p.m. and 11:40 p.m. on August 14, 1988.

7. That it is my toxicologic opinion that Ms. Hilliard was in the highest category of intoxication. Ms. Hilliard would have been experiencing severe depression of the central nervous system. This would be manifest mentally, behaviorally and physically. The effects

of alcohol at this level of intoxication would include but not be limited to the following:

Severely impaired vision
Distorted perception
Inability to make appropriate judgements
Severely depressed reactions
Loss of control of motor coordination
Bloodshot watery eyes
Speech impairment

8. That this high level of intoxication is dangerous to the person being effected by the alcohol in a number of areas. There are severe toxicologic consequences to the persons physiology at such high alcohol levels. In addition a persons ability to function successfully in the world, in otherwise usual situations, is likewise extremely depressed and therefore dangerous.

9. That given abnormal or threatening circumstances, combined with this extreme level of intoxication, the person would be seriously endangered and virtually incapacitated.

10. That this level of intoxication should be apparent to essentially all observers and especially to a trained observer.

FURTHER AFFIANT SAYETH NAUGHT.

SEAL

/s/ Kathey M. Verdeal, Ph.D.
Kathey M. Verdeal, Ph.D.

Subscribed and sworn before me this 13th day of June, in the County of Boulder, State of Colorado.

/s/ Mary A. S. Bennett
Notary Public
880 Interlocken Pkwy. #255
Broomfield, CO 80020

My commission expires October 11, 1992.

COLORADO FORENSICS AND TOXICOLOGY, INC.
880 Interlocken Pkwy. #255
Broomfield, Colorado 80020
Phone: (303) 460-1650

KATHEY M. VERDEAL, PH.D.

ADDRESS:

Colorado Forensics and Toxicology, Inc.
880 Interlocken Parkway, Suite 255
Broomfield, Colorado 80020

BORN:

June 29, 1949, Denver, Colorado

EDUCATION:

Ph.D., 1982, Mammalian Toxicology
Center for Environmental Toxicology
Wisconsin Clinical Cancer Center
University of Wisconsin-Madison,
Madison, WI

M.S., 1978, Food Chemistry
University of Wisconsin-Madison,
Madison, WI

B.S., 1976, Food Chemistry
Colorado State University,
Fort Collins, CO

A.A., 1973, Physical Education
Arapahoe Community College,
Littleton, CO

PROFESSIONAL EXPERIENCE:

Present:

Director of Colorado Forensics and Toxicology, Inc., Broomfield, Colorado.

Services Offered:

Consultation, testifying, and analytical services in the areas of human and environmental toxicology, forensic chemistry, industrial chemistry, and food chemistry. Providing analysis of biological fluids and tissues for drugs, toxins and alcohol, with interpretation and application of results. Analysis of substances; toxins and social drugs of abuse. Experimental research design involving live animal models; extending into toxin use, levels, and analysis of the resulting biochemical alterations and diseases.

July 1, 1985 - June 10, 1986:

ChemaTox Laboratory, Inc., Boulder, Colorado.
Employed as a consultant and analyst in the physical and biological sciences. Providing laboratory services and expert testimony in environmental toxicology, mammalian toxicology and forensic chemistry. Analysis of body fluids and tissues for toxic substances, drugs and alcohol.

1982 - 1985:

The Upjohn Company, Pharmaceutical Division, Denver, Colorado.
Territorial Manager. Responsibilities included: physician and pharmacist education of Upjohn (and competitive) pharmaceuticals regarding use and side-effects. Distribution of controlled substance samples, lectures and program coordination.

1982 May-October:

University of Wisconsin-Madison, Wisconsin Clinical Cancer Center.
Study of carcinogenic compounds commonly found in industry and the environment. Research Associate involved in research and development of animal cancer models to evaluate the effects of drugs on tumor growth, hormone and enzyme levels in blood and various tissues. Analysis of human blood and tissue in relation to drug/ hormone/cancer interactions.

AWARDS:

Advancement Opportunity Fellowship
Doctor Barns Distinction in Teaching Award
James Price Award for Cancer Research

PUBLICATIONS:

Six Publications - Toxicology
Two Abstracts - Toxicology
Two Thesis - Toxicology

CERTIFICATIONS:

Colorado Department of Health Controlled Substance Licensing;
U.S. Drug Enforcement Agency Controlled Substance Licensing;
Colorado Department of Health Certification for the Analysis of Alcohol in Body Fluids and Tissue;
Colorado Department of Health Certification for the Analysis of Alcohol in Silica Gel.

DRUG TESTING:

Presumptive Screening - Toxilab System is certified by the College of American Pathologists;
Confirmations - Gas Chromatography/Mass Spectroscopy - Finnigan Ion Trap Detection System (in house).

ASSOCIATIONS:

American Association for the Advancement of Science - seven year membership